# Supreme Court of the United States.

## OCTOBER TERM, 1875.

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JOSEPH HOBSON ET AL., Plaintiffs in Error,

*vs.*

DANIEL W. LORD.

*In error to the Circuit Court of the United States for the Southern District of New York.*

BRIEF FOR THE DEFENDANT IN ERROR.

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BRIEF FOR THE DEFENDANT IN ERROR.

In July, 1870, Mr. Lord's ship, the "Lincoln," was proceeding from Guanape Islands to Callao, for clearance, when she collided with the British ship "Brothers German," and was so seriously damaged as to require a discharge of her cargo and extensive repairs. She proceeded, after the collision, to Callao, her nearest port, where she came to anchor, (subsequently moving to a place over two miles distant from where she would have anchored had she merely called for a clearance,) July 24, 1870, in distress and unable to proceed upon her voyage, by reason of the injuries sustained as aforesaid. She was necessarily detained there, undergoing repairs, until November 17, 1870, when she was re-laden. Her crew were necessarily kept by her, and their services were requisite for her safety while in dock. (Record, p. 15.) The owner sent an agent out to Callao to supervise the re-

pairs. It is customary in New York to allow the expense of such an agent as an item of general average, (*Id.*) The court allowed the wages and provisions of the crew and the agent's expenses, up to November 17, 1870, the plaintiffs in error having given bond to pay whatever was found due from them upon an average adjustment made "conformably to law and the usages of the port of New York." (Record, pp. 4, 11, 15, 18.) It is to the allowance of these items that the plaintiffs in error object.

## I.

### 1.—As to the wages and support of the crew at Callao.

These are objected to upon the narrow ground that the Lincoln did not "bear away" from her previous course in consequence of the collision, but proceeded to Callao, whither she was going for her clearance when the accident occurred.

The case finds (Record, p. 15) that the presence of the crew and their services were essential to the safety of the vessel, and the ultimate conveyance of the cargo by her. Hence this expense was *for the benefit of all*, and properly an item of average.

1 Burrill's Law Dict., 167.
Potter *vs.* Ocean Ins. Co., 3 Sumn., 39.
Kingston *vs.* Girard, 4 Dallas, 274.

"Whatever is necessarily done for the common benefit ought to be done at the common expense."
Nelson *vs.* Belmont, 21 N. Y., 39.

Judge Story remarks, in Potter *vs.* Ocean Insurance Company, (3 Sumn., 41,) that "in causes of this sort it will not do to refine too much upon metaphysical subtilties," and the court observed, in Insurance Company of North America *vs.* Jones, (2 Binney, 547,) that the criterion of general average is when the expenses were "necessarily and un-

avoidably incurred for the safety of the ship and cargo;" or, as stated in Nelson *vs.* Belmont, (21 N. Y., 39,) "general average expenses arise *either* from voluntary sacrifice, *or extraordinary expenses* incurred, for the joint benefit of the ship and cargo," upon the principle before stated. Such is the language of this court.

McAndrews *vs.* Thatcher, 3 Wallace, 365.
Star of Hope, 9 Wallace, 228.

"The *spirit* of the regulation is in its *reason*, because the act was done for the benefit of all." (Per Lowrie, J., in Nimick *vs.* Holmes, 25 Penn. St., 371; Holt on Shipping, 482.) "If an intermediate port must be entered because the vessel, in consequence of a particular damage sustained, is unfit to *prosecute her voyage*, all the expenses of entering the port are general average, being a consequence of a measure voluntarily taken for the safety of the whole." (Levi, Int. Com. Law, 873-4.) "There was the *voluntary expenditure* of money to save the ship and cargo from the sinking condition in which the disaster left them; and *this was as much the subject of general average as a regular jettison*, made in order to preserve the ship and cargo from the perils of a storm at sea." (L[illegible] *vs.* Alvord, 18 Conn., 75, *q. v.*) Upon the next page (76) the court say: "In the case under consideration, the expense was necessary to rescue the vessel and cargo from the peril of sinking; it had the effect to save them; and it was voluntary, *or it would not have been incurred.*" (18 Conn., 76.)

Perhaps no case precisely similar to this in its facts—of a ship taking refuge in distress at a foreign port, where she was to call, but to land nothing—can be found. As the court of Louisiana remarked, in Harrod *vs.* Lewis, 3 Martin, 314, "so various and diversified are the transactions of men and the occurrences of human life, that it is almost impossible to find two cases precisely alike."

The best we can do is to apply to questions which arise

those principles upon which former questions *substantially* the same, though not identical, were determined, disregarding unessential differences; especially when we are considering a subject in relation to which, (as Sir Wm. Scott said, 3 Rob. Adm., 266,) "whatever is *reasonable* and *just*, is likewise *legal*."

All that is essential to an average claim is that the ship shall be driven by extraordinary peril into a port of refuge or necessity, other than a port of discharge, whereby the *voyage is interrupted.*

Williams *vs.* Suffolk Ins. Co., 3 Sumn., 513–14.
Fowler *vs.* Rathbones, 12 Wallace, 114.

It must be to save *the enterprise* that the average expenses are incurred.

3 Wallace, 365.
9 Wallace, 228.
Bailey on Gen. Average, 43–45.
Hopkins' Handbook of Average, (3d Ed.,) 79–86.
Lowndes on Gen. Av., 10.

Callao was the "proper and convenient" port for necessary repairs, (3 Sumn., 38,) where "detention by accident, happening *after the commencement* of the voyage," occurred. (Padelford *vs.* Boardman, 4 Mass., 554; 2 Phillips on Ins., § 1321.) The "bearing away" is only assumed as the act definitely establishing the interruption of the voyage. *It generally marks a limitation of time, but is never a condition precedent.* Thus, in Plummer *vs.* Wildman, (3 M. and S.,) 482, which is often cited as a leading case in England against the allowance of wages, (though in fact it was only the captain's services and crimpage that were claimed and rejected,) Lord Ellenborough said: "If the return to port was necessary for the safety of the whole concern, the expenses unavoidably incurred by such necessity might be considered as a general average. It is not so much a question whether the first cause of the damage was owing to this or that accident—to

the violence of the elements or the collision of another ship—as whether *the effect* produced was such as *to incapacitate the ship*, without endangering the whole concern, *from further prosecuting her voyage*, unless she returned to port and removed the impediment." Irrespective of the circumstance that the Lincoln was to call there for a clearance, the collision made Callao, *in fact*, "a port of necessity," and it was because of this that the ship proceeded two or three miles beyond her first anchorage ground, instead of simply going to sea from there.

Arnould, in the fourth English edition of his work on insurance, (page 781,) says:

"From these principles it follows that where a ship has been so damaged that it is necessary, for the safety of both ship and cargo, to put into a port of distress for repairs, all the expenses inseparably connected with the act of putting into port give the ship-owner a claim to general average contribution."

See Am. Ed. of same work, vol. 2, chap. iv., § 330, page 330.

Grier, J., in delivering the opinion of this Court, in Barnard *vs.* Adams (10 Howard, 303,) remarked that "the law of general average has its foundation in equity." It would be a singular illustration of this doctrine to hold that the items claimed would properly be allowable had the Lincoln borne away to Samanco bay, Casma or Huaco, and were not so because the repairs were made at Callao! Or that if she had simply taken her clearance, and then been able to proceed as far as Pisco or Independence Bay, and there made a harbor, that the claim and recovery would be any more equitable than it now is!

In the average bond (Record, 4,) the plaintiffs in error recite that, by reason of a collision, "sundry expenses and charges have arisen, and various *sacrifices* have been made, *which are the subject of general average*, and should be borne

by the property at risk as a common charge in contribution;" * * * in consideration of which they promise to pay their "respective proportions of *such expenses, charges, and sacrifices as have arisen in consequence of the disaster aforesaid.*" "There was expended at Callao, by the master, $17,349.43, as to which the defendants' (plaintiffs in error) liability in general average is not contested." (Record, 10, folio 24.) If, then, it is conceded that an average claim existed, upon what *principle* can the wages and provisions of the crew during the detention be excluded from the computation? Especially when their services were shown to be essential to the preservation of the ship, and that they were not merely kept by her so as to be ready when she was repaired?

The English law differs widely from ours as to what constitutes a general average loss or claim; and is entitled to the less regard since, as their latest writer upon the subject declares, in regard to the items properly to be included, "England stands alone against almost all the world." (Lowndes on Gen'l Av., 128.) He modestly adds: "Still, it is *just possible* that we may be in the right." Upon page 159, the same author says: "In most countries, when the putting into a port of refuge in order to repair is treated as a general average act, giving a right to compensation, * * * the law recognizes as one of those expenses the ship-owner's loss from having to pay and feed the crew during the forced suspension of the voyage. In England it is not so." He intimates, however, (upon page 162,) that "it may become necessary (for English courts) to reconsider the present rule as to the crew's wages and provisions."

In his appendix, giving a synopsis of the law in other countries, he remarks, (p. 406, § 11,): "It is the settled law and practice of the United States, that the wages and provisions of the crew, *during the detention* resulting from a ship's bearing up for a port of refuge, are treated as general average. * * * The wages and provisions thus allowable are

computed from the *date* of bearing up for the port of refuge to the date of sailing thence on a voyage." This confirms my idea that the "bearing up" is only mentioned as a means of fixing the precise time the detention commenced. If the necessary detention and interruption of the voyage commenced later than this, or terminated before "the date of sailing," as was the case here, then the true limits of the *necessary* detention are those from and to which the general average expenses are to be computed.

See Brig Mary, 1 Sprague's Decisions, 17, as cited in plaintiff's brief, page 33, where that judge thus puts and answers this inquiry:

"From *what time* is the allowance of wages and provisions to commence? It is admitted to be the *general* rule that it is from the *time when* a vessel in distress alters her course to seek a place of safety."

This is the general rule only because *generally* a ship, after her voyage has once commenced, has to deviate from its course to seek a port of safety, and thus marks the beginning of the detention. It is the *terminus a quo*, and not an essential circumstance of an average claim.

Flanders, in his work on Maritime Law, (p. 267, § 328,) says that the conflict between the English and American authorities arises from their courts making a discrimination, which ours do not, as to the causes of the damage which requires the vessel to seek a port; so that, even in England, if the occasion be one of general average, the wages and provisions of the crew are an element. To the same purport is the language of Benecke: "If an intermediate port (*i. e.*, one between those of lading and discharge,) must be entered, because the vessel, in consequence of a particular damage sustained, is *unfit to prosecute her voyage*, all the expenses of entering the port are the subject of general average, being the consequence of a measure voluntarily taken for the preservation of the whole." He then quotes the

leading English cases, from 3d and 4th of Maule and Selwyn, and then continues: "*It can by no means, however, be deduced from this that wages and provisions are excluded from general average, also, when a vessel is obliged to seek a port for the purpose, only, of repairing a damage which itself belongs to general average.*"

Phillips' ed. of Stevens and Benecke on Av., (A. D. 1833,) pp. 118, 123.

In the seventh English and fifth American edition of Abbott on Shipping, (p. *493,) it is said that the cases there cited have not determined conclusively that wages and all expenses should not be considered "if the damage to be repaired is itself an object of contribution." To the same effect, Smith on Mercantile Law, 376. And so the plaintiff's counsel puts it, (Brief, 9,) in stating his first point: "UNLESS *the cause of injury be itself a general average loss*," which their bond admits it was.

Notwithstanding counsel have thus stated the alternative of a sacrifice "OR *extraordinary* expenses," they steadily ignore its application throughout their argument, as well as the distinction indicated as to the original cause of injury.

In Padelford *vs.* Burnham, (4 Mass., 548,) the damage was by a storm, an *ordinary* peril, and not a cause of general average, and it was only the bearing away that gave the right of recovery of *any* of the expenses as general average. But a cause of general average having arisen from the interruption of the voyage, the wages, &c., then became items of the adjustment, as matter of course. The preliminary inquiry was whether there was any claim for average at all, or not.

So, in Spafford *vs.* Dodge, 14 Mass., 66, (as quoted upon page 29 of the plaintiffs' brief,) the Court declared the cause of detention to be one so like a "*a common peril* of the sea" as not to make a case for general average. Collision is not

a *common* but an *extraordinary* peril, creating a general average claim when it induces "an extraordinary expense."

So, Mr. Justice Washington, in the case of Ross *vs.* The Active, 2 Wash., C. C. 241, as quoted by plaintiffs, (p. 26 of Brief,) says that general average *only* arises from an emergency or *extraordinary* peril to which the ship has been exposed, and not from the ordinary occurrences of the voyage; and that the ship-owner's obligation is to keep the vessel staunch "during the voyage, *unless prevented by some extraordinary peril.*" (Brief, top of p. 27.)

It is enough that the "extraordinary peril" *interrupts the voyage and threatens its destruction, unless extraordinary expense is incurred for its preservation.* 2 Phillips on Ins., (fifth ed.,) § 1321; 18 Conn., 75.

In Emerigon on Ins., (Meredith's ed., A. D. 1850,) p. 482, ch. XII, sec. LXI, it is said: "A vessel injured by tempest, rendered *incapable of continuing her navigation* without running risk of being lost, puts into the *first* port to be repaired. The time she passes there, the expenses of discharging and reloading cargo, *the wages and subsistence of the crew*, all this is admitted, when arrived at her place of destination, into general average." The reason given is that "if the vessel injured by tempest were not repaired in the port of repose, she would remain innavigable. This would bring the most serious prejudice to the cargo. It is then a question of expense incurred *for the common good and safety.*" The last words are italicized in the text. An expense *necessarily* incurred "*after the commencement of the voyage,*" and that it may be prosecuted for the advantage of all concerned, is the true test. (Dilworth *vs.* McKelvey, 30 Mo., 155; 2 Phillips on Ins., § 1821.)

There is a palpable distinction between this case and that of an embargo. An embargo is merely an exercise of a lawful authority by the sovereign, to the consequences of which (whether advantageous or injurious) all citizens are alike subject and must submit. (Ins. Co. *vs.* Jones, 2 Bin-

ney, 564.) The damages (if any) thereby inflicted are precisely like those that may at times be consequent upon legislation; therefore are not occasions for reparation, but must be borne by him upon whom they fall. A merchant could not claim a general average loss, because the tariff had been greatly raised upon his importations while they were *in transitu* to this country. Again: embargo does not *interrupt* a voyage; it simply postpones its commencement. The cargo (as well as ship and crew) is in the very same port that it would have been if not laden on board the vessel; and it would have been equally detained if on shore instead of afloat. (Penney *vs.* N. Y. Ins. Co., 3 Caine's Cases, 155; McBride *vs.* Marine Ins. Co., 7 Johns, 431; 2 Phillips on Ins., § 1321.)

There is no analogy between such a case and that of collision resulting in *extraordinary* expenses, which is confessedly a cause of general average.

In cases of embargo *no* general average claim was admitted; there were no elements from which to make up one, except wages and provisions; here the existence of a claim is admitted, and only its *items* are in dispute.

As before remarked, this suit is not upon an *implied* promise of contribution, deduced from the general principles of maritime law, but *an action upon a bond*, (Plaintiffs' brief, 1,) which *estops* the plaintiffs-in-error from denying that there was a *cause* of general average, leaving *only* the inquiry whether or not the items mentioned are properly elements of an average adjustment under "the law and usages" of New York.

The plaintiffs' first assignment states the error, in substance, to be that, conformably to this law and usage, wages and provisions, during a detention, are not general average, "unless the vessel departs from the course of her voyage;" also claiming that they cannot here be included by reason of "the special provisions of the charter and the special facts of the case." (Plaintiffs' brief, 7.)

It does not appear from the record that any point was made upon this branch of the case in the court below, based upon the phraseology of the charter-party; therefore, it cannot be assigned here.

Indeed, NO BILL OF EXCEPTIONS TO ANY OF THE JUDGE'S RULINGS APPEARS BY THE RECORD TO HAVE BEEN TAKEN OR ALLOWED.

The bond in suit was to pay conformably to the general law and ordinary usages of the port of discharge; it is upon *that* instrument we must act, regardless of the charter or any other previous agreement between the parties.

But the provisions of the charter were never intended to relieve the charterers from the customary responsibilities for general average contribution.

The Court found that "the special facts" did not change the law or usage.

The same remarks apply to the other assignments of error.

The plaintiffs in error contend throughout that, to constitute a general average claim, something must be *given*—a *sacrifice* must be made—ignoring entirely the other element of *every* definition of general average, (in this country, at least,) "OR *extraordinary* expenses incurred," as we have already noticed.

If their assumption and argument is right, why did counsel and clients admit their liability for repairs, &c.?

Was not the expense of wages and provisions incurred just as much for the common benefit at Callao as it would have been had the ship been able to proceed as far as Iquique? The interruption of the voyage, and the consequent expense, might have been greater at the latter port than the former, but the principle which would make these contributory items is the same in either case. The wages, &c., during the time the vessel was going from Callao along the coast, till she bore away for Iquique, would not have come into an average adjustment, because she would have

been following the prescribed route toward Hampton Roads; and this is just what Judge Story meant in charging the jury, in Potter *vs.* Ocean Ins. Co., 3 Sumn., 31, (quoted on p. 31 of Plaintiffs' brief,) that "if the return to New Orleans was in the regular course of the voyage" the verdict must be for the defendants; for, in that case, the crew and vessel would have been doing precisely what they would have done had no injury been received. He further held that it was enough that it was in *fact* a port of necessity, even though it might have been the port of discharge had no accident occurred.

In Bixby *vs.* Insurance Company, cited on same page, (31) the vessel sailed with a cargo belonging to her owners, (of whom the captain was one,) to be sold at such port in St. Domingo as was found most advantageous. After touching at several of these ports, she went into Maragaone, in that same island, (where her cargo was sold and discharged,) made some temporary repairs, thence went to Wilmington, there completed her repairs, loaded again with a cargo for, and which she took to, Maragaone, whence she went to Boston. The wages and provisions were allowed in going to Maragaone the first time and thence to and at Wilmington, notwithstanding the fact that Maragaone was a port in the island for which she had cleared, and where her cargo was in fact landed and sold; that did not prevent Maragaone being considered "a port of necessity."

Of the very few cases mentioned by the plaintiffs in error in which wages and provisions have *not* been allowed in average—none of which are analogous to this one at bar; and in almost every instance, *no* average contribution was decreed, even as against *insurers*—that of Dunham *vs.* Com. Ins. Co., (11 Johns., 315,) held simply that, *after the cargo had been safely delivered at the port of discharge* named in the bills of lading, it could not be held to contribute to the wages, &c., in general average, just as plaintiffs contend; but in the second volume of his work on insurance, Mr. Phillips

commences the section (1321) in which he cites this case with this italicised statement of the law:

"1321. *The expense of delay is not contributed for* in general average, *except where the voyage, having commenced and being in progress, is suspended*, in order to refit, or on account of some extraordinary circumstance."

2 Phillips on Ins., (5th Ed.,) 97, § 1321.

He thus states, it will be seen, the very proposition for which we contend, viz: that it is *the interruption of and danger to the voyage* that constitutes a cause of general average. That is all that is meant by "bearing away," or "intermediate port," &c., &c. This is further evident from his next section (section 1322, *not* 1328, as printed in Plaintiffs' brief) which he begins with this italicized statement:

"1322. *Extraordinary delay at sea for the purpose of making repairs is a subject of average.*" He then cites what my opponents call (brief, 42,) "the two carpenter's case, of a vessel delaying five days at sea for repairs," and concludes the section thus: "Such a case is not at all distinguishable in principle from going off the course to seek a port of necessity." So we say here.

In Wightman *vs.* McAdam, (2 Brev., 230,) the cargo being safely delivered and accepted before any repairs were made, no contribution was ordered for items that tended nothing to their rescue. In this case, the ship *did* "bear away," but that circumstance made no difference. But the authorities say that this case, even in the facts of it, is contrary to the weight of American law.

In Giles *vs.* Eagle Ins. Co., (2 Metc., 40,) where a fisherman on a cruise with no cargo on board, (unless the fish caught and the outfits are so called,) was driven ashore, the Court held there that the wages and provisions could not be included, citing De Vaux *vs.* Salvador, (4 Ad. and El., 429, 431,) where Denman, C. J., makes a distinction between an average adjustment between shipowners and insurers, and

one between the owners of the ship and of the cargo. This Massachusetts case, (2 Metcalf, 40,) did not rest upon nor notice any such distinction as the plaintiffs in error now attempt to *create*.

Referring to this case, Mr. Phillips says: "It is assumed by Mr. Justice Buller, in a case before referred to, (Da Costa *vs.* Newnham, 2 T. R., 407,) that the same repairs made, or labor done, at a port of necessity, by men hired for the purpose, and not belonging to the ship, may be general average, which might not be so if only the crew had been employed. The decision of a Massachusetts case on a time policy, (Giles *vs.* Eagle Ins. Co., 2 Metc., 40,) *rests wholly upon that suggestion.* * * * * * This distinction might be made in England, where the wages and provisions of the crew are not allowed in general average, but seems to be quite inapplicable in our jurisprudence where they are allowed. The decision of this point, therefore, seems to be in conflict with *our settled doctrine and practice.*"

2 Phil. on Ins., 103, § 1329, and note 2; and § 1340, note 2, p. 111.

Parsons also says, (1 Pars. on Ship., 386,) "This case would seem to be *opposed* to the prevailing rule in Massachusetts."

An examination of all the authorities shows that the distinction the gentleman seeks to establish has no more existence in law than it finds reason or justification in fact. Just what is meant (at the top of page 30 of his brief) by supposing a difference between the payment for wages and provisions under contract and their being voluntarily given, is not apparent as applied to the actual circumstances of this case. The sailors could and would claim their wages and support under the shipping articles until discharged by the regular completion or the authorized abandonment of the voyage; and the payment of these items would have been no more voluntary, nor any less matter of contract, at Pisco

Bay or Iquique than at Callao. The case finds the ship valued at $21,000; that the *repairs* and expenses to November 17, 1870, amounted to $22,829.08. (Record, 10, 11.) The master had the right, then, to abandon the ship and voyage as the expense of repairs were likely to, and did, exceed the value of the vessel. (See Moss *vs.* Smith, 9 C. B., 94, cited on page 37 of Plaintiffs' brief, and authorities *passim.*) Instead of exercising this right he *voluntarily* elected to repair the vessel that the joint enterprise might be carried to the termination originally contemplated. Here was all the exercise of will required by law.

In considering what he admits are "the opposing authorities," (upon page 37 of his brief,) the counsel falls into what we deem two great errors. First, he assumes that he has "great weight of authority" for his claim of the necessity of an interjected voyage, whereas he has *absolutely none;* but only allusion to a bearing away as marking a definite point of time. Second, he entirely ignores all the earlier New York decisions by Judge Kent and his associates, and the other authorities hereinbefore and hereinafter cited, when he represents us as relying solely upon Nelson *vs.* Belmont, The Clytie, and Mr. Phillips' *dictum*, though we are happy to be supported by these authoritative expositions of the law.

2. As to the SECOND POINT, according to the plaintiffs' division. Upon this we only propose the remark that our position is that "*interruption of the voyage*" is the ground of average; but that *if, as the plaintiffs in error contend, an actual deviation from the prescribed and intended route is essential, that did occur here.* We do not assume that detention from, or interruption of, "the course of the voyage" means simply a break in the intended physical track—the "wake"—of the vessel, *but of the prosecution of the joint enterprise.* Still, if the law is so intensely technical as the plaintiffs claim, we say (in that case) here was "a solution of the continuity" of

the voyage sufficient for our purpose. That is, if the law is based on reason, we are within its reasoning; but if merely technical, we are embraced within its strict technicalities. We prefer to base our claim upon reason, and to assume that the detention or interruption meant is a delay and expense not within the contemplation of the parties as naturally expected to occur, or as a *probable* incident of the performance of the contract for the conveyance of the cargo. The question is, whether it is an ordinary "*or an extraordinary expense incurred for the common benefit,*" that the joint enterprise might be carried to completion as originally proposed.

3. *As to the* THIRD POINT *of plaintiffs' division.* (Brief, 45.)

The plaintiffs, by the line of argument they are compelled to adopt under this head, and *by the stipulations of their bond in suit* have excused us from any extended consideration of this "point." They are compelled to transpose two entirely different provisions, and to ignore the clause upon folio 17 of the Record that "extraordinary and unforeseen circumstances, * * * * fire, and all and every other dangers of the seas, &c., &c., always excepted." It is sufficient to remark that if this ground were tenable it would defeat the whole claim for general average; whereas the plaintiffs in error do not dispute their liability, but only these three items.

## II.

Under the rule of *lex loci*, and the express stipulation of the average bond declared upon, it is of little consequence that the courts of England have, to a certain extent, though just how far her own authors cannot determine, arrayed themselves (as Lowndes says, *ubi sup.*) against the opinion of the world. "England, in conformity with the maritime laws and usages of all nations, holds that the place of the

ship's destination or delivery of her cargo is the place at which the average is to be adjusted. This adjustment must be made conformably to the law of that place," and when so made is conclusive everywhere. (4 Phillimore's Int. Law, 641; Wharton on Confl. of Laws, § 445; Simonds *vs.* White, 2 B. & C., 805, 811; Dogleigh *vs.* Davidson, 5 D. & Ry., 6,) where wages, because included under a foreign adjustment were paid as an average loss in England. (McLoon *vs.* Cummings, 73 Penn., 104–'5.)

Whatever doubts may have arisen in other forums, the courts of New York have never spoken ambigiously upon this subject. In Leavenworth *vs.* Delafield, (1 Caine's Rep., 575,) wages and provisions were allowed during a detention caused by capture. Referring to this, in Walden *vs.* LeRoy, (2 Caine's Rep, 264,) Kent, Ch. J., said: "In this case the vessel was forced into port by the injuries received at sea, which rendered it *necessary* for the *general safety* to go into the *nearest* port to repair." He declares the same principle applicable to both cases; and, after further discussion, it was again applied in the next cause reported, (Henshaw *vs.* Marine Ins. Co., 2 Caine's Rep., 274,) Kent, Ch. J., saying (on p. 277) "that the wages and provisions of the crew *during the necessary detention* at Dublin to repair go into general average." That is *all* he said. Nothing was said by *him* about "bearing away," though the *reporter* uses those words in the syllabus. Speaking of these items, the same learned judge remarked, in Barker *vs.* Phœnix Ins. Co., (8 Johns, 319:) "There is no real foundation, *nor even a plausible pretence*, for any objection to this part of the recovery." To the same effect are the latter cases in New York, Rogers *vs.* Murray, 3 Bosw., 368; Nelson *vs.* Belmont, 21 N. Y., 38, also reported in 5 Duer, 310, where the average adjustment, including wages and provisions, is stated upon page 326.

The text writers, English and American, and other courts recognize the law to be thus established in New York and most of the other States in the Union. Lowndes on Gen.

Av., 406-7, before cited, where he gives the rates then established at New York for the cost of provisions, conformably to which this average was adjusted. (Record, 10, folio 26.) Abbott on Shipping, (seventh Eng. or fifth Am. Ed.,) 597, [*498,] note 1, where it is said: "In America the rule seems definitely settled in our principal commercial States," &c., &c. "This may be regarded, we think, as the settled doctrine and practice in this country." (1 Parsons on Shipping, 386.) "The wages and provisions of the crew, *during the detention*, constitute the subject of general average, according to the decisions in New York," &c., &c., (3 Kent's Com., 12th ed., *235.) "But the law has been differently settled (from the English rule) in the American courts, and we apprehend is now *at rest upon this point*, perhaps in every State in the Union, certainly in all the principal commercial States." (Thornton *vs.* U. S. Ins. Co., 12 Maine, 152; 2 Arnould on Ins., (Am. ed.,) ch. iv, sec. 111, art. 3, § 333, pp. 909, 911, Ib. (4th Eng. ed.,) 784.)

In the note 2 to § 1329 of 2 Phillips on Ins., 103, cited *supra*, that author remarks, in support of his text to the same effect: "Other English cases are cited where the wages and provisions of the crew were not allowed during delay and going off the course to refit; but those are, as we have seen above, under the English rule on this subject, differing from that which prevails in the American jurisprudence and practice, and so *of no weight whatever* in reference to the same matter with us."

Not only the reported decisions heretofore cited, but the *fact* that, in adjusting the loss upon the Clytie, Mr. Southmayd, at a date subsequent to the institution of this action, made an investigation of "the law and usages of the port of New York," and was led to the conclusion to which that experienced adjuster, Mr. Phillips, had long before arrived, in relation to this matter, is cumulative evidence that it is founded in reason and supported by authority.

This sum of $2,674.26, then, with interest from June 1,

1871, was properly allowed to Mr. Lord, "according to the law and usage of the port" of New York. (Fowler *vs.* Rathbones, 12 Wallace, 120, 121.)

## III.

### As to the services and expenses of Mr. Lord's agent, Capt. Patterson.

The stipulation of the average bond is to pay not only "conformably to law," but also to "the *usages* of the port of New York." The whole system of average adjustment arises from usage; and Gibbs, C. J., in Taylor *vs.* Curtis, (2 Marsh., 318,) declared that the items that should constitute a general average were only determinable by usage. Independently of any special agreement, we have seen that it is the usage prevailing at the port of discharge that is to govern; and it would seem that as the expense of Capt. Patterson's journey, stay and services, were an incident of the detention, and their object to render it as short and as little injurious as possible to all parties interested, the usage to include such expenditure as an item of general average was reasonable. At all events, its existence must have been known to the Messrs. Hobson, Hurtado & Co., whose business was transacted at New York, and was connected with the shipping interest there as the agents of the Peruvian government in the United States for chartering ships for the conveyance of just such cargoes and upon such voyages as the Lincoln undertook. The usage could not exist unless reasonable. Its existence has been found as *a fact* in this case by the learned district judge. (Record, p. 11, folio 27.)

That he states the evidence upon which this finding is based, is wholly immaterial. The *fact* must be accepted, however ascertained.

Wiscart *vs.* Dauchy, 3 Dallas, 324.

The evidence to establish the usage being legally admissable and proper, its *weight* and the facts thereby established were exclusively for that court. Its conclusion in this particular are final. (Zeller *vs.* Eckert, 4 Howard, 298; Prentice *vs.* Zane, 8 Howard, 470; Graham *vs.* Bayne, 18 Howard, 60; Guild *vs.* Frontin, Id., 135; Y. & C. R. R. Co. *vs.* Myers, Id., 251–'2; Suydam *vs.* Williamson, 20 Howard, 432; Burr *vs.* Des Moines, 1 Wallace, 99; Saulet *vs.* Shepherd, 4 Wallace, 502; DeGroot *vs.* U. S., 5 Wallace, 427; U. S. *vs.* Adams, 6 Wallace, 112; Ins. Co. *vs.* Tweed, 7 Wallace, 44; Bassett *vs.* U. S., 9 Wallace, 38; Norris *vs.* Jackson, Id., 135; Copelin *vs.* Ins. Co., Id., 467; Coddington *vs.* Richardson, 10 Wallace, 518; Cooper *vs.* Omohundro, 19 Wallace, 70; Crews *vs.* Brewer, Id., 72; Express Co. *vs.* Ware, 20 Wallace, 543; Ins. Co. *vs.* Sea, 21 Wallace, 158; Jennisons *vs.* Leonard, Id., 302.) According to this last-cited case, the only inquiry permissible here is "the sufficiency of the facts found to support the judgment." (21 Wallace, 307.) This is so even if the question of usage is a mixed one of law and fact. (18 Howard, 251–'2.)

It being thus ascertained that the adjustment "was according to the usage and custom of the court, * * the plaintiff is entitled to a judgment for the amount stated in the average adjustment, with interest from its date. Framed as that decision was *in precise conformity with the stipulations of the average bond*, it is impossible to regard it as erroneous." (Opinion per Clifford, J., in Fowler *vs.* Rathbones, 12 Wallace, 121.)

The *bond* supersedes all prior agreements.

EDWIN B. SMITH,
*Counsel for Defendant-in-error.*

# Supreme Court of the United States.

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JOSEPH HOBSON *et al.*

*vs.*

DANIEL W. LORD.

*No.* 189. *Brief in reply, by Plaintiffs in error*

Without resuming the discussion of the main question, argued the following points, and suggestions in the brief for defendant in error, seem to require special notice.

**1.**—That the plaintiffs in error are concluded by the recital in the average bond, from denying that all the expenses at Callao were general average. (Defendant's brief, 5, 6.)

The average bond is merely a security for the payment of such charges as shall be found according to law and usage to be proper general average charges.

This is its object and evident meaning, and the burden is, of course, on the plaintiff in the suit to show, as to each item claimed, that it is general average.

The recital clearly is not an admission, conclusive or otherwise, that *all* the expenses and charges incurred at Callao, in consequence of the collision, are general average. At the utmost it is an admission that *some* of the charges and expenses there incurred are general average.

And it would seem that, if the plaintiff failed to show any general average item according to law and usage,

he must fail in the suit, notwithstanding the recital in the bond.

It appears that, as to some of the expenses at Callao, it was not contested upon the trial that they were general average. It does not appear what these expenses were, but it appears that the cargo was removed from the ship and stored, and there is authority in the cases cited in our former brief, that these charges may be general average, though wages and provisions are not so.

It is enough to meet this objection that there are any charges other than those in question that may be general average, even supposing that the recital is anything more than a conditional admission that there are some such general average charges claimed by the shipowner, which the shipper agrees to pay, provided the same shall be made to appear according to law and the usage of the port of New York. Strictly, the admission relates to no one expense in particular, and certainly not to all. General average bonds accompany the delivery of the cargo, and are to be treated as a security exacted by the shipowner, that in surrendering his lien which he loses by parting with the possession, he may not lose all security for the payment of what may be due to him from the shipper. It is a case of substituted security, and the bond should not be construed otherwise than as a substituted security, unless the contrary intention is clear.

From the necessity of the case, average bonds are exacted and given ordinarily upon the arrival, or soon after the arrival, of the ship, and without exact knowledge of the facts on the part of either party.

Moreover, it will be observed that the case below was not tried on this question whether the plantiffs in error were concluded by the recital in their bond, but upon the questions that have been here presented, whether the wages and provisions during detention to repair, and Capt. Pattersons bills are proper charges in general average.

See Judge Shipman's opinion. (Record Fol. 36–51.)

**2.**—That because certain items of the general average claim were not contested, therefore the plaintiffs in error

are precluded from objecting to the claim for wages and provisions (brief p. 11).

This also is a point on which the case was not tried below. See opinion *et supra*.

But the admission of Hobson & Hurtado with or without the sanction of their counsel, can not make the law or affect the question whether in law the items thus not contested were in law proper items of general average. Still less can it affect the question here whether certain other items are general average. It does not appear also whether the allowance of these ~~other~~ items was by advice of counsel or not, and the Court has not the means of ascertaining by the record whether the admission, such as it was, was well advised or not.

**3.**—It is also claimed that by the recital of the bond and the admission by the parties that certain expense were general average, the expense of wages and provisions must be allowed, on the ground that if there is *any* general average, loss of wages and provisions are a part of it. (Brief p. 10 11)

There is, it is insisted, no authority for this proposition If the *injury* making the repairs necessary is itself a general average injuiy, as the cutting away of a mast, then the wages and provisions during the detention in any port, whether out of the course of the voyage or not, may be considered a part of the sacrifice (a); or, if the vessel seeks the port of refuge out of the course of her voyage, then the wages and provisions are goneral average, because such new voyage is out of the purview of the contract.

perhaps

But collision and sea damage involuntarily suffered by the ship, are not by any authority *general average injuries*.

And in case of injury by collision or sea damage, the repairs are wholly chargeable to the hip, even in a port of refuge, unless they are *temporary and not permanent*, and are designed merely to enable the ship to complete, her voyage and of no utility to the ship otherwise.

The *injury* in this case, therefore, not being a general average injury, and the repairs being expressly found to

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Moreover, it will be observed that the case below was not tried on this question whether the plantiffs in error were concluded by the recital in their bond, but upon the questions that have been here presented, whether the wages and provisions during detention to repair, and Capt. Pattersons bills are proper charges in general average.

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be of a *permanent and not of a temporary character*, there is no ground for the assumption on which this objection is founded, that there was a general average injury which draws after, it, as part thereof, the wages and provisions.

And neither the recital in the bond nor the admission of the parties has given this character of a general average injury to the injury which this vessel received. (a)

**4.**—It is also assumed without any warrant from the facts found, that the ship was injured to an extent exceeding her value, and therefore was discharged from her obligation to continue the voyage. (Defendant's brief p. 15.)

In fact there is no finding as to the expense of the repairs. The amount referred to by defendant's counsel as the amount of the *repairs and expenses* to Nov. 17, 1870, $22,829.08, consists of the two disputed items and the expenses as to which no contest was made. (Record fol. 24–26.)

That these did not include the expense of repairs appears sufficiently from the fact found that the repairs were *permanent*, not *temporary* (record fol. 23). Whatever claims the plaintiff in error may have allowed to be charged to him, it is not supposable that the repairs were so allowed, as there is no pretense that they were general average.

A reference to the surveys is sufficient to show that it was not a case of total loss. (Record fol. 22, 29–33.)

Moreover, the fact that the defendant in error did repair her, is some evidence that she was worth repairing.

It does not appear, therefore, that the owner of the ship had the right, as is claimed, to abandon the voyage, and voluntarily elected to repair, that the joint enterprise might be continued.

This also is a point on which the case was not tried below. (See opinion *ut supra*.)

The ship and her pending freight were worth $51,000 (Reocrd fol. 24).

**5.**—That there may be a case of equal hardship, where

(a) That there may be a general average charge or expense, caused by the collision, having no connection with or effect upon wages & provisions may be easily demonstrated. Thus if the master at Callao, while waiting for repairs to keep ship afloat had a steam pump it would be a clear case of a general average charge caused by the collision. Now all the bond can be said to admit is some general average charge caused by the collision

the ship makes the repairs in a port of call as where she bears away to a port of refuge (Brief of Defendant p. 5.)

Whatever shall be the limits found by the Court to circumscribe and limit allowances in general average, there will always be found cases coming near the limit but outside of it, of apparent hardship.

But this is not peculiar to general average. Courts are always pressed by the apparent similarity of hardship to apply an acknowledged rule of relief to hard cases just outside the rule. But such appeals are vain, where the rule, as in this case, rests on a principle, and the case of supposed hardship has not the elements that bring it within the principle.

**6.**—That there is no bill of exceptions. (Brief, p. 11).

Upon trial by the Court, on waiver of jury, the Statute expressly provides "that when the finding is special, the review [on writ of error] may also extend to the determination of the sufficiency of the facts found to support the judgment."

13 Statutes at Large, 501—Act of March 3, 1865, §4.

7 That a usage broad enough to cover Capt. Patterson's bill is found by the Judge as a fact. (Brief p. 19.)

The point insisted on by the plaintiffs in error is that the Judge, while calling the usage a general usage, does in reality find that it is not broad enough to cover this exceptional case. There is not only a reference to the evidence, but in substance a finding that there was no evidence that the usage extended so far. A finding which on its face appears to be a finding without evidence, is an error of law. (Record, fol. 27.)

8.—That as to Capt. Patterson's bill, the bond supersedes all prior agreements. (Brief, p. 20).

The point made seems to be that the plaintiffs in error having agreed by the bond to pay such charges as are general average according to law and the usage of the Port of New York, can no longer show that as to any particular item under other circumstances allowed in

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But this is not peculiar to general average. Courts are always pressed by the apparent similarity of hardship to apply an acknowledged rule of relief to hard cases just outside the rule. But such appeals are vain, where the rule, as in this case, rests on a principle, and the case of supposed hardship has not the elements that bring it within the principle.

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the case of the Lincoln, there was an antecedent agreement making a special exception of that item, as for instance an express warranty in the charter party against the charge of expenses of such an agent.

This would give a force and meaning to the bond inconsistent with its purpose and intent. The contract actually existing between the parties is to be assumed to have been in the view of the parties when the bond was given, and the bond was given to enforce the existing rights of the shipowner ~~under~~ to a construction consistent with that contract and charter party and not to ~~enlarge~~ amend or vary them.

WM. G. CHOATE,
*of Counsel for Plaintiff, in error.*

The additional cases cited by defendant in error do not affect the argument.

Loring vs. Mfg. Ins. Co. 20 Pick 413 — merely holds that an adjustment is to be made according to the law and usage of the part of adjustment. This is not disputed. There is no evidence of usage in New York affecting the question of wages & provisions & the only question is one of law.

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